88-1511

Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ISAAC RUNNELS
and
GREGORY MARSHALL, Petitioners

v

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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(I)

QUESTIONS PRESENTED

1. Whether the consent to search Petitioners' checked luggage was coerced and not freely and voluntarily given.

2. Whether DEA Agents were required to admonish Petitioners of their right not to consent to a search of their checked baggage after their departure from the airport.

3. Whether the Government's theory that joint possession in the contraband luggage barred the Government from asserting a lack of standing in the luggage.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

ISAAC RUNNELS and GREGORY MARSHALL,

PETITIONERS

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 13, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is not reported. It is reproduced in the Appendix (App.2a-8a)

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. S 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV :

> The right of the people to be secure in their persons,houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

On July 24, 1987, the Petitioners were indicted by the Grand Jury in the United States District Court, Northern District of Georgia, Atlanta Division, on two (2) counts alleging the violation of 21 U.S.C. S846 (Conspiracy to possess cocaine with intent

to distribute) and 21 U.S.C. S841(a) and 18 U.S.C. S2 (Possession of cocaine with intent to distribute). Their joint pretrial motion to suppress was denied on October 27, 1987, by the Magistrate Court Judge, and approved by the U. S. District Court Judge on December 7, 1987. On December 15, 1987, Petitioner Runnels entered a conditional plea of guilty to 21 U.S.C. S841(a) and 18 U.S.C. S2. He was sentenced to six (6) years incarceration. Petitioner Marshall proceeded to trial and was found guilty by the trial Court of violating 21 U. S. C. S846; 21 U. S. C. S841(a) and 18 U. S. C. S2. He was sentenced to six (6) years incarceration. Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit. The District Court's evidentiary rulings on the motion to suppress and standing in regards to Petitioner Marshall were affirmed in an

Opinion on January 13, 1989. (App. 2a-6a).

The evidence at trial showed that on March 3, 1987, between 10:00 P.M., and 10:30 P.M., Isaac Runnels (Runnels) and Gregory Marshall (Marshall) arrived at the Hartsfield Airport in Atlanta, Georgia, from Fort Lauderdale, Florida. Runnels and Marshall were in Atlanta, Georgia, to catch a connecting flight to Chicago, Illinois, which was scheduled to leave at approximately 11:00 P.M.

DEA Agents Michael Smith and Gary Hall Ivey were at the Hartsfield Airport watching passengers as they left the Fort Lauderdale flight. Runnels was casually dressed and carrying a camera case when he left the plane. Marshall was wearing a bright red shirt and gold chain and carrying a large radio commonly known as a "ghetto blaster" when he left the plane. The DEA agents

testified that this attire, in addition to the fact that neither Runnels nor Marshall asked airline personnel for directions to their connecting flight, or gave the appearance of traveling together, caused the agents to follow them.

After leaving the plane, Runnels and Marshall went to the terminal lobby and looked up at an overhead television monitor that listed incoming flights. After viewing the monitor, Runnels walked towards a Delta Airline employee and Marshall went to the men's washroom. However, instead of speaking with the Delta airline employees, Runnels went to the men's washroom.

While Runnels and Marshall were in the washroom, each agent took turns watching them. Although Runnels and Marshall were only in the washroom for a few minutes, the agents concluded that they were traveling together because they briefly exchanged a

few words which neither agent heard. Runnels and Marshall left the washroom separately and continued to walk separately throughout the airport terminal to an escalator still being followed by Agents Smith and Ivey.

After riding an escalator to the train station located on the terminal's lower level, both men used the telephone. During their telephone conversations two trains arrived and left the station. When a third train arrived Runnels and Marshall ended their respective telephone conversations. A computer activated voice indicated the train was about to leave. Both men then boarded the departing train followed by the agents. When the train arrived at Concourse C, Runnels and Marshall departed and started walking to Eastern Airline's boarding area to catch their flight to Chicago.

However, before they could reach the escalator, they were immediately surrounded by Agents Smith and Ivey. The agents identified themselves as police officers and asked to speak with Runnels and Marshall. The agents directed Runnels and Marshall to an isolated area near the escalator and asked for their airline tickets.

Runnels became frightened and apprehensive, but produced airline tickets for both men. After discovering that Runnels was traveling under the name of Bill Davis, and Marshall was traveling under the name of James Johnson, the agents demanded that Runnels and Marshall produce further identification.

The agents looked at Runnel's identification and then asked if the men had checked any luggage with the airline. The airline tickets indicated that five (5) pieces of luggage were checked. However,

Runnels, immediately explained that there had been a mix-up with his luggage and that they only had three (3) pieces of luggage not five. Marshall stated that he did not have any checked luggage.

After detaining Runnels and Marshall in the isolated area near the escalator, the agents testified that they wanted to search both Runnels and Marshall and their luggage. When confronted with the request to search their persons and their luggage, both Runnels and Marshall expressed great concern about missing their flight to Chicago. The agents assured them they would not miss their flight. Runnels also informed both DEA agents that one of the bags was locked. However, Runnels never volunteered the key to the locked bag and the agents never asked for the key. Runnels testified that he did not give the agents permission to search the checked baggage and they did not ask his

permission to search the baggage. The agents then escorted both men to the boarding area of Eastern Airlines.

When they arrived at the Eastern terminal other passengers were preparing to board an airplane for Chicago. At this time, the agents conducted a pat-down search of both men near the boarding area. Failing to discover anything illegal on their persons the agents then searched the baggage and radio carried by them. Agent Ivey testified that he boarded the aircraft to secure and retain the checked luggage. He stated that it was normal DEA procedure to search the baggage in the presence of the suspect. Agent Ivey further testified that he had memorized the checked baggage claim numbers when he briefly looked at the airline tickets approximately fifteen minutes earlier.

During this time, the agents testified that Runnels and Marshall were not in custody. However, Agent Smith remained behind to keep a close watch over Runnels and Marshall and sat directly across from them in the boarding area. While waiting for Agent Ivey to return, the men asked Agent Smith if they could leave. Although Agent Smith did not tell them they could leave, he did state: "If the airlines will let you fly on that ticket with somebody else's name on it, we don't care." At this time the Eastern Airline personnel informed the agents that the flight to Chicago was about to depart and stated, "if these guys are going on the plane, they got to get on now."

Shortly thereafter, Agent Ivey returned and stated that he could not find the bags belonging to Runnels and Marshall. At this time Eastern Airline personnel were making

final preparation to depart and the men again requested permission to leave.

The agents testified that they again secured the airline tickets from which they wrote down the baggage claim check numbers. They then permitted the men to depart. The agents did not request that the Petitioners sign a consent-to-search form, and did not request that Runnels give them the key to the locked baggage before his departure. The agents did not advise them of their right not to consent to a search of their baggage outside their presence.

The Eastern Airline flight departed for Chicago at approximately 11:00 p.m. After Runnels and Marshall were thousands of feet in the air, Eastern Airline personnel located their baggage in the terminal. At approximately 11:20 p.m., under the direction of DEA Agents Smith and Ivey, airline personnel were immediately ordered

to break into the baggage including Runnel's locked bag.

The agents did not get a trained search dog to sniff the luggage for the presence of contraband, and they did not attempt to secure any judicial or governmental authority to search the bags. The DEA agents testified that they did not secure a search dog or search warrant because of exigent circumstances and their fear that the defendants could not be apprehended.

The search of the baggage disclosed the presence of a quantity of cocaine for which the Petitioners were subsequently arrested and indicted. The Petitioners filed a pretrial motion to suppress all physical evidence seized from the luggage. The Magistrate Court recommended that the motion be denied. (App. 9a-29a) The District Court approved the recommendation and denied the motion. (App. 30a-32a)

Petitioner Runnels entered a conditional plea of guilty and was sentenced to six (6) years incarceration. Petitioner Marshall was found guilty by the trial Court and was sentenced to six (6) years incarceration. The Petitioners then appealed to the Eleventh Circuit Court of Appeals, where the decision of the District Court was affirmed. U.S.A. - v.- Isaac Runnels and Gregory Marshall, No. 898-8223 (11th Circuit Court of Appeals, January 13, 1989).

REASONS FOR GRANTING THE PETITION

Petitioners, Isaac Runnels and Gregory Marshall, seek to reverse their convictions because their constitutional rights guaranteed by the Fourth Amendment to be free from unreasonable searches and seizures were violated.

The search in this case occurred outside the presence of petitioners as they

were travelling by plane to Chicago, Illinois, from Atlanta, Georgia. The only justification given at a suppression hearing before the District Court was consent. The Court has condoned consent as an exception to the requirements of a warrant or probable cause in Schneckloth v. Bustamonte, 412 U.S. 218, 36 L Ed. 2d 854, 93 S. Ct. 2041 (1973). The court noted in that case that the Fourth Amendment does not require the same standard needed for an intelligent and knowing waiver of Fifth Amendment rights:

> Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. Id., at 868.

The Court concluded that in consent searches the lack of advice to the accused of his constitutional rights was a factor to be considered on the question of voluntariness. The Bustamonte case reached the Supreme

Court because the Ninth Circuit Court of Appeals reversed the District Court's denial of the defendant's Petition for A Writ of Habeas Corpus. The Ninth Circuit Court of Appeals relied on Cipres v. United States, 343 F2d 95 (1965), which made knowledge of the right not to consent a necessary element of a valid consent.

The position of the Cipres decision was acceptable to dissenting Justices Douglass, Brennan and Marshall. The majority opinion, however, stated:

> Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Id., at p. 875.

In Footnote 29 the Court expressed the thought:

> By the same token, the present case does not require a determination of the proper standard to be applied in

> assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he been placed in custody.

It is urged in the instant case, aside from the question of coercion, that the Court mandate that when law enforcement officers engaged in monitoring transportation centers seek to search the baggage of travelers outside their presence and control, when it is known in advance that such a search will be done, a knowledgeable waiver of the Fourth Amendment be required.

The Court in Bustamonte felt that to give advice of the right to refuse would be impractical and require too many details. That Court said at p. 865:

> Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate

> further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial right. . . And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in Miranda v. Arizona, supra, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Id., at pg. 865.

In the instant case it is argued that the petitioners' baggage was certainly in custody. The petitioners had lost all control over their property. The police now had complete custody and control and no exigent circumstances were apparent. This Court recognized in United States v. Place, 103 S. Ct. 2637, 462 U. S. 696, (1983) that the consequence of seizing a traveler's bags can be serious.

> Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or

> to arrange for its return. Therefore, when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause. Id., at p. 2645.

However, the Court felt that a brief detention of the bags following a legitimate investigatory stop for investigation by a trained sniff dog to be constitutionally permissable:

> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Id., at pp. 2644-45.

Although the Court held the detention period to be too lengthy and unreasonable, it recognized the detention was in furtherance of an investigation to find probable cause and not to search. In the instant case the bags were held in the custody of the police without the slightest effort to find

probable cause. The entry was made on consent alone. The consent here was secured without any advice of a Fourth Amendment right not to consent. It is urged here, that fairness requires no less warning of constitutional rights when property is held in custody than the case of custodial interrogation. Miranda v. Arizona, 384 U. S. 436, 508, 16 L. Ed. 2d 694, 86 S. Ct. 1602.

WHETHER THE CONSENT TO SEARCH PETITIONER'S BAGGAGE WAS VOLUNTARILY GIVEN

The petitioners were initially stopped pursuant to the subjective belief of the agents that their conduct was articulably suspicious. It is settled law that such stops are permissible. Terry v. Ohio, 392 U. S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968). Disregarding the quality of this suspicion, it is apparent that probable

cause to detain petitioners did not exist.

Here, the petitioners agreed to walk with the agents to the Eastern Airline boarding area. Once there, however, the agents requested and received permission to conduct searches of their persons and luggage. The agents were aware, as were the petitioners, that their plane was in the final boarding stages. The petitioners, however, acquiesed in the request by the agents to sit with one of them in the boarding area while the other went aboard their plane in a search for their luggage.

The Court in United States v. Mendenhall, 446 U. S. 544, 64 L. Ed. 2d 497, proclaimed that a person is seized within the meaning of the Fourth Amendment when he reasonably believes that he's not free to walk away from an encounter with the police. It is unreasonable to believe that the petitioners would be sitting with an agent in the boarding area when the airline agent

said, "if these guys are going on the plane, they got to get on now," if they believed they were free to leave. The answer of Agent Smith "if the airlines will let you fly on that ticket with somebody else's name on it we don't care," did not free them. They were still there when Agent Ivey returned from his fruitless search aboard the plane for the baggage.

The Court stated in Bustamonte:

> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Id., at p. 863.

The Court further stated:

> For no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. Id., at p. 864.

If it is held that petitioners were not actually detained, it is clearly arguable

that their consent for the search aboard the plane was coerced. Requiring them to wait to the last moment was coercive. The fact that they waited and were only permitted to board after a warning by the airline and a second surrender of the plane ticket demonstrates the depth of this subtly coercive police conduct.

It is in this setting that the agents sought consent to search the bags wherever they were found in the terminal. The police knew at this point that petitioners would hardly be present when the search was conducted. The fact that they failed to advise petitioners of a right not to consent is one of the key factors listed by Bustamonte in determining the voluntariness of the consent.

The sequence of events here bear heavily on the contention that the consent was not freely and voluntarily given:

(1) they were escorted to the boarding area by the agents; (2) they were searched near the boarding area; (3) they waited until the last moment to board; (4) they surrendered the baggage claim check numbers at the final moment of boarding; (5) they were advised by the airline that the plane was about to leave; (6) they were not informed of the disposition of their bags; (7) they were not advised of their right not to consent to a search of their bags after their departure.

It is urged that under the totality of circumstances position of Bustamonte, the consent in this case was not freely and voluntarily given.

THE GOVERNMENT'S THEORY THAT JOINT POSSESSION IN THE CONTRABAND LUGGAGE BARRED THE GOVERNMENT FROM ASSERTING A LACK OF STANDING IN THE LUGGAGE.

In the instant case the Government argued in the bench trial of petitioner Gregory Marshall that he aided and abetted the commission of the crime. They contended that both petitioners could have exerted control over the baggage claim checks at any time. This theory was advanced as a basis for finding that petitioner Marshall had knowledge of the criminal enterprise.

It is unfair for the Government to now contend on appeal that the disclaimer of petitioner Marshall to any of the luggage should bar his standing to assert a violation of his Fourth Amendment rights. They should not be allowed to have it both ways. This position is similar to the one

criticized in United States v. Isaacs, 708 F.2d 1365 (9th Circuit 1983),

> Here, however, the government wants it both ways: It seeks to rely on Isaac's disavowal of ownership to defeat his right to contest the lawfulness of the search at the same time it introduces the journal as evidence of his guilt. Id., 1368.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8233
Non-Argument Calendar

D. C. Docket No. 87-275

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ISAAC RUNNELS, a/k/a
BILL DAVIS,
Defendant-Appellant.

No. 88-8224
Non-Argument Calendar

D. C. Docket No. 87-275

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

GREGORY MARSHALL,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

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(January 13, 1989)

Before HILL, VANCE and EDMONDSON, Circuit Judges

PER CURIAM:

On December 7, 1987 Isaac Runnels pleaded guilty of knowingly possessing with intent to distribute more than 500 grams of a mixture containing cocaine in violation of 21 U.S.C. S 841(a) and 18 U.S.C. S 2. On January 25, 1988 Gregory Marshall was found guilty of conspiracy to possess over 500 grams of a mixture containing cocaine with intent to distribute in violation of 21 U.S.C. S 846, and of knowingly possessing with intent to distribute more than 500 grams of a mixture containing cocaine in violation of 21 U.S.C. S 841(a) and 18 U.S.C S 2. Each defendant was charged with aiding and abetting the other. In this consolidated appeal Runnels and Marshall challenge their convictions asserting that the trial court erred in denying their motions to suppress evidence obtained during the search of Runnels'luggage and that the

trial court erred in determining that Marshall lacked standing to contest the search of luggage in which he claimed no ownership interest. For the reasons stated below, we affirm.

On March 3, 1987 Gary Ivy and Michael Smith, drug enforcement agents assigned to the Atlanta Hartsfield International Airport, were monitoring the arrival of Flight 110, which originated in Fort Lauderdale, Florida, considered by the agents to be a drug source city. The agents observed Runnels and Marshall deplane and behave in a manner that suggested, in the agents' experience, that they might be couriers for contraband. The agents followed the defendants into the next concourse. As the defendants walked past the agents, Ivy identified himself and asked if he could speak to them. The defendants agreed to talk. Ivy requested to see their

airline tickets and Marshall pointed to Runnels. Runnels produced the tickets, issued under assumed names, with five baggage claims stapled to the ticket jacket. Marshall said he had no checked bags and Runnels said he had one checked bag but that the airline had mistakenly stapled extra baggage claim checks to his ticket. Later Runnels stated that two of the bags belonged to him. Ivy returned the ticket envelope to Runnels and asked to see some identification. Marshall said he had none. Runnels produced a firearms license which Ivey examined and returned. Ivy then said he was a narcotics agent and requested permission to search their persons and luggage including their checked luggage. The trial court found that the defendants agreed although they expressed concern that they not miss their flight. Ivy assured them they would not miss it. At the gate

Smith asked Runnels again for permission to search his checked bags. Runnels consented and Smith asked Runnels to produce his baggage claim checks again. Runnels complied and Smith copied down the claim numbers. After the defendants departed on their Chicago flight, the agents searched Runnels' checked baggage and discovered a quantity of cocaine in a locked bag claimed by Runnels.

Defendants contend that their motions to suppress should have been granted because their fourth amendment rights were violated when they were stopped and seized, that consent to search was involuntary, and that the DEA agents exceeded the scope of any consent by searching their checked baggage. After an extensive hearing, the trial court found that the initial encounter of defendants with the DEA agents was

restricted in scope and non-coercive in manner. Agent Ivy identified himself and asked Runnels if he would be willing to speak to him. Runnel's path was not blocked nor was he touched. Runnels voluntarily presented his flight ticket and identification. Such a non-coercive stop does not trigger fourth amendment protection. See United States v. Hammock, No. 88-8040 (11th Cir. Nov. 18, 1988); United States v. Berry, 670 F.2d 583, 594 (5th Cir. Unit B 1982) (in banc). The district court also found that the agents requested permission to search the checked luggage and that Runnels voluntarily consented and produced for a second time his baggage claim checks and allowed the agents to copy the claim check numbers. We have reviewed the record and cannot conclude that these findings are clearly erroneous. See United States v. Newbern, 731 F.2d 744, 747

(11th Cir. 1984).

The trial court also concluded that Marshall did not have standing to challenge the search and seizure of the luggage that contained the cocaine. The trial court found that Marshall never asserted any ownership interest in the luggage that was searched. The law in this circuit is clear that when a defendant disclaims ownership of an article of luggage he is precluded from asserting a privacy interest in that luggage. See United States v. McKennon, 814 F.2d 1539, 1546 (11th Cir. 1987); United States v. Hawkins, 681 F.2d 1343, 1345 (11th Cir.), cert.denied. 459 U. S. 994 (1982).

Accordingly, the decision of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA : CRIMINAL ACTION
v. :
ISAAC RUNNELS, a/k/a : NO. CR87-275A
Bill Davis

and

GREGORY MARSHALL a/k/a :
R. Johnson and James Johnson

MAGISTRATE REPORT AND
RECOMMENDATION

The defendants, Runnels and Marshall, have been charged in a two count indictment with conspiracy to possess with the intent to distribute in excess of 500 grams of a mixture containing cocaine, and with knowingly possessing with intent to distribute in excess of 500 grams of a mixture containing cocaine. Each defendant has filed a motion to suppress a quantity of cocaine seized on March 3, 1987, at the Atlanta airport. An evidentiary hearing was held before the undersigned magistrate

October 20, 1987.

FINDINGS OF FACT

Detective Gary Hall Ivy of the Clayton County, Georgia Police Department, and Georgia Bureau of Investigation Agent, Michael Wayne Smith, were assigned to the Atlanta International Airport Drug Task Force. Ivy and Smith were monitoring the passengers arriving from Ft. Lauderdale, Florida, on March 3, 1987. Ft. Lauderdale, Florida, is a source city for cocaine. Defendant Gregory Marshall was dressed casually in a red shirt with a gold chain around his neck which attracted the attention of Agent Smith. The defendants avoided the ticket agents who were advising arriving passengers where they could meet their connecting flights. The defendants looked at each other without speaking and

proceeded down the concourse walking approximately 12 feet from each other. Defendant Marshall entered a men's room on the concourse and was followed by Detective Ivy. Shortly thereafter, Defendant Runnels entered the men's room, appeared nervous, and did not speak to Marshall. After looking around, Runnels went over to Marshall and spoke to him and then the defendants left the men's room, one following the other. The defendants entered the transportation concourse which provides transportation to passengers by train from one concourse to another and to the terminal building. The defendants both approached the public pay phones and while holding a telephone, they talked while two trains arrived and departed. Agent Smith testified that it appeared that the defendants were talking to each other and that they had spotted the drug agents who were observing

them. The third train arrived and just as it was about to depart both defendants jumped on board. Agent Smith and Detective Ivy were able to board the next car in the same train just as the train was leaving.

The defendants left the transportation corridor and as they were approaching the departure gate, Detective Ivy spoke to defendant Marshall, identified himself, and asked if he could see his ticket. Defendant Marshall indicated that defendant Runnels had his tickets. Defendant Runnels was asked by Detective Ivy if he could see the tickets. Defendant Runnels appeared very nervous; his breathing was shallow and rapid, and he did not appear to be able to find the tickets although they were clearly visible in his pocket. One of the agents pointed out the tickets to defendant Runnels and as he reached for them, he dropped them on the floor. Detective Ivy noticed that

the name given by Mr. Runnels was not the name on his ticket. The defendant, when asked his name, told the agent that his name was Runnels. The ticket was in the name "Davis" and was a one-way cash ticket with five baggage claim checks stapled to the ticket envelope.

Detective Ivy, after observing the ticket and baggage claim checks, returned those to defendant Runnels and asked him if he had any identification. Mr. Runnels produced a firearm permit in the name Runnels which Detective Ivy examined and returned to defendant Runnels.

Detective Ivy asked the defendants, after identifying himself as a drug agent looking for narcotics being transported through the Atlanta airport, if they would consent to a search of their person and luggage. Defendant Marshall indicated that he did not have any luggage and defendant

Runnels at first said he had one piece of luggage. Defendant Runnels was asked about the five baggage claim checks and he explained that he had two pieces of luggage which were checked at the Ft. Lauderdale airport by the Sky Cap but he explained that the Sky Cap had made a mistake and had given him five claim checks but only two of them were his.

Neither defendant was carrying any luggage. They did have a camera and a radio. Detective Ivy testified that he specifically asked the defendants for permission to search their checked luggage and received their consent.[1] The

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[1]Defendant Isaac Runnels testified that the agents never asked permission to search either his person or his luggage and that he gave no one permission to make such a search.

defendants indicated that they did not want to miss their airplane and Detective Ivy told them that he believed he could secure the checked luggage and examine it without causing them to miss their flight. A pat-down search of each defendant was made in the waiting area at the departure gate. Defendant Runnels described the two bags he claimed as his for Detective Ivy. Detective Ivy told defendant Runnels that he would board the aircraft and see if he could find the checked luggage. The defendants consented. A short time later Detective Ivy returned and told the defendants that their luggage was not on board and that the airline would not hold the aircraft any longer to await luggage from connecting flights. G.B.I. Agent Smith asked defendant Runnels if he could again examine his baggage claim checks so that they could identify his luggage and examine it.

Defendant Runnels consented and produced the baggage claim checks. The agents recorded the numbers and told the defendants that they would attempt to locate the baggage and examine it. The defendants asked if they were free to leave and the agents said they were.

No written consent to search the checked luggage was requested or obtained. No search warrant was requested or obtained. The defendants were not specifically advised that they had a right to refuse permission to search or to consult a lawyer before making the decision.

The defendants departed the Atlanta airport for Chicago on a flight which would take a little more than an hour to complete. The agents hoped that they would be able to locate the luggage and complete their search in time to radio Chicago and have agents meet the defendants as they arrived in order

to affect an arrest. The luggage was located and searched. The luggage which defendant Runnels had described as his was located, consisting of a grey bag and a brown bag with a name tag reading "Diane Brazil." The brown bag with the name "Diane Brazil" attached to it was locked and the agents had the lock cut in order to examine the contents. When they opened the bag they found a package containing cocaine. The three bags which defendant Runnels did not claim were also searched. Two of those bags had name tags with the name "James Johnson" and one of those bags contained a jewelry appraisal with the name of "Greg Marshall".[2]

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[2]Defendant Greg Marshall at all times during the encounter at the Atlanta airport denied ownership of any of the checked baggage. Defendant Runnels explained that the baggage claim checks

Defendant Isaac Runnels testified at the suppression hearing that he never gave the drug agents permission to search his person or his luggage. Mr. Runnels testified that the agents seized his airline ticket with the baggage claim checks attached and retained possession of it and for that reason he thought he was under arrest and not free to leave. Mr. Runnels testified that only after the agents discovered the luggage was not on board the departing flight did they return the tickets to him. He said that when he arrived in Chicago, he discovered the agents had kept the baggage claim stubs and that he attempted to locate his luggage through lost and found in Chicago. Defendant Runnels testified that the reason he was traveling under an assumed name was because he was a married man and that he had been to Florida to visit a woman, not his wife. He did not explain why

he would return home to his wife with luggage containing name tags in the name "Diane Brazil." The defendant also testified that one purpose of his visit to Florida was to obtain dental services but on cross-examination he did not remember the name of the dentist or the location of his office. When asked about the name of the woman he was visiting he had difficulty remembering her name, finally testifying upon the prompting of his attorney that he thought her name was Diane.

The undersigned magistrate did not find Mr. Runnels' testimony to be credible.

CONCLUSIONS OF LAW

I. MARSHALL'S PRIVACY INTEREST

Defendant Greg Marshall, at all times during the encounter at the Atlanta airport, denied ownership of any luggage. His traveling companion, defendant Runnels, supported that denial by advising the

inquiring agents that the other baggage claim checks were provided to him in Ft. Lauderdale by mistake. The court in United States v. McKennon, 814 F.2d 1539, 1546, held that where a defendant disclaims ownership of an article of luggage any expectation of privacy precludes his assertion of a privacy interest in that luggage. Thus, defendant Marshall may not assert a privacy interest in any of the luggage which the agents searched in this case. Accordingly, the undersigned magistrate recommends that the Motion to Suppress filed by defendant Gregory Marshall be denied.

II. RUNNELS' EXPECTATION OF PRIVACY

Defendant Isaac Runnels, during the encounter at the Atlanta airport, claimed a possessory interest in one and then another piece of luggage, both of which he

described to the agents. Defendant Runnels therefore claimed possessory interest in the grey bag[1] and the brown bag with the name tag which read "Diane Brazil."[2] Runnels did not claim possession of the other three bags and thus, the undersigned magistrate recommends that his Motion to Suppress with respect to the other three bags and their contents be denied.

III. CONSENT TO SEARCH

Defendant Runnels contends that he was stopped and seized March 3, 1987, as he changed planes at the Atlanta airport. This

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[1]The grey bag was marked by the narcotics investigators with the symbol N6 and was marked at the suppression hearing by the government as MT32.

[2]This piece of luggage was marked by the narcotics agents as N7 and was marked by the government at the suppression hearing as MTS5. This brown bag contained the package of cocaine which was seized by the government.

defendant contends that the search of his luggage which had been checked at Ft. Lauderdale, Florida, through to its final destination in Chicago, Illinois, was conducted without his consent and without a search warrant in violation of his rights under the Fourth Amendment.

The recent decision of United States v. Willis, 759 F.2d 1486, 1495 rehearing denied. 765 F.2d 154 (11th Cir. 1985), sets forth the legal standard to be applied. It holds as follows:

> This circuit has established a three-tier analytical framework for such search and seizure inquiries. United States v. Berry, 670 F.2d 583 (5th Cir. Unit B 1982) (en banc). Least intrusive are stops of a restricted investigative scope conducted in a non-coercive manner. These do not trigger fourth amendment protection

> at all. A stop beomes a seizure when, under all the circumstances of the intrusion, a reasonable, ordinary person in the suspect's position would believe he is not free to leave. The fourth amendment permits such seizures only when supported by a reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Dunaway v. New York, 442 U. S. 200, 99 S. Ct. 2248, 60 L. Ed.2d 824 (1979).

The initial encounter of defendant Runnels was restricted in scope and conducted in a completely non-coercive manner. Detective Ivy identified himself and asked if the defendant would be willing

to speak to him. The defendant's path was not blocked and he was not touched. The defendant was asked to produce his flight ticket which he voluntarily did and then the defendant voluntarily presented identification.

Permission to search the defendant's person and luggage was requested and granted. The defendant indicated that he did not wish to miss his flight and was assured that he would not. His airline tickets were examined and immediately returned to him along with the baggage claim checks. When the defendant asked if he could board his flight, he was advised that he could do so.

The defendant argued during the suppression hearing that the consent given for the search did not extend to a search of his checked baggage although the other testimony, including testimony of the

defendant, clearly indicated that the agents sought consent to search the checked luggage and discussed with the defendant their securing the luggage from the aircraft and examining it in his presence prior to departure. When that plan failed because the luggage was not on board the aircraft, the defendant was asked a second time to permit the agents to look at the baggage claim checks so that they could find and search the checked luggage. The defendant, without objection, produced a second time the baggage claim checks. The defendant's argument that the consent given did not extend to the checked luggage is totally inconsistent with the credible testimony produced at the suppression hearing.

The defendant argues that whatever consent he gave was not voluntary because the agents did not advise him of his right to refuse consent and his right to consult

with counsel. The defendant also argues that the agent should have requested the defendant to consent, in writing, to a search of his checked luggage.

A consent to search is not invalid simply because it is not in writing or because the govenment agents did not tell the defendant that he was not required to consent and that he had a right to consult with an attorney, but courts give great weight to these circumstances in determining the voluntariness of a defendant's consent. United States v. Waksal, 709 F.2d 653, 661 (11th Cir. 1983). While a defendant's awareness of his right to refuse consent to a search is a factor, it is not the controlling factor. United States v. Phillips, 664F.2d 971, 1023-1024 (5th Cir. Unit B. 1981), cert denied, Meinster v. United States and Myers v. United States, 457 U.S. 1136, 103 S. Ct. 208, 74 L. Ed 2d

1354 (1982). See also United States v. Kapperman, 764 F.2d 786, 794 n. 11 (11th Cir. 1985), reh'g denied, 770 F.2d 1084 (11th Cir. 1985).

While it would have been better practice for these agents to have advised the defendant of his right to refuse consent to search and of his right to counsel there was absolutely no evidence to indicate that the consent given was other than voluntary. The consent clearly encompassed a search of his checked luggage. The government relies totally on the oral consent given by this defendant to search his checked luggage. The defendant was advised of Detective Ivy's identity and the purpose of his search and knew fully that the requested consent was to cover the luggage he had checked in Chicago. Under all of the circumstances presented, the undersigned magistrate finds that the defendant voluntarily and knowingly

consented to the search of this checked luggage. No Fourth Amendment rights were violated.

MAGISTRATE'S RECOMMENDATION

The undersigned magistrate, for the reasons set forth above, recommends that the defendants' motions to suppress evidence be denied.

IT IS SO REPORTED AND RECOMMENDED, this 27th day of October, 1987.

WILLIAM L. HARPER

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	FILE NO.
	:	CR87-275A
ISAAC RUNNELS and	:	
GREGORY MARSHALL	:	

ORDER OF COURT

This matter is before the court on the Report and Recommendation ("Report") of the Magistrate. In the Report, the Magistrate recommends that this court deny both defendants' motions to suppress evidence. The defendants have filed objections, and the government has reponded to those objections.

The defendants requested that the court allow them an opportunity to present oral argument in support of their objections, but the court has deemed that oral argument is not necessary. The court has considered the Report, the parties' pleading, and a tape

recording of the hearing on the motions to suppress which was conducted by the Magistrate. After extensive de novo review of the record before the court, the court APPROVES and ADOPTS the Report and Recommendation.

The court is not persuaded by defendant Marshall's argument that he has standing to challenge the constitutionality of the search and seizure of the luggage which contained the contraband at issue in this case. The law in the Eleventh Circuit is clear that a defendant precludes any assertion of a privacy interests in an article of luggage when that defendant disclaims ownership of the luggage. See United States v. Hawkins, 681 F.2d 1343 (11th Cir. 1982); United States v. McKennon, 814 F.2d 1539, 1546 (11th Cir. 1986).

Likewise, defendant Runnels' objections to the Report do not pass muster. Among

other factors to consider, the fact that the agents did not advise him of his right to refuse consent to their requested search or of his right to consult with counsel is not controlling regarding the finding by the court of the voluntariness of defendant Runnels' consent to the search.

In summary, the court APPROVES and ADOPTS the Report and Recommendation of the Magistsrate, and DENIES the defendants' motions to suppress.

SO ORDERED, this 7th day of Dec. 1987.

HORACE T. WARD

UNITED STATES DISTRICT JUDGE